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Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

SHARON S. BREIER,

Petitioner,

v.

COOPER-STANDARD AUTOMOTIVE FHS, INC.,
fka ITT AUTOMOTOVE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, construing evidence most favorably to Petitioner, in a case involving a claim of disability discrimination under Ohio Revised Code Sections 4112.01 et seq., medical records submitted by Petitioner establish that she was disabled under the Ohio statute and, if so, whether Petitioner's explanation as to why she filed for and received Social Security disability benefits was sufficient to negate her sworn assertion in her application for disability benefits that she was unable to work.

2. Whether Petitioner, who was proceeding in the Court of Appeals pro se, was entitled to a de novo review by the United States Court of Appeals for the Sixth Circuit of the District Court's grant of summary judgment to Respondent on Petitioner's retaliation claim brought under Ohio law under Ohio Revised Code Sections 4112.01 et seq. and on Petitioner's claim for intentional infliction of emotional distress brought under Ohio Common law and whether the denial of such review by the Appellate Court below was improper given the fact that Petitioner did indeed make passing reference to these issues in her pro se brief.

PARTIES TO THE PROCEEDING

Sharon S. Breier, Petitioner and Plaintiff-Appellant below, is an individual resident of the City of Archbold, County of Fulton, State of Ohio and was formerly employed by Respondent.

Respondent, Defendant-Appellee below, Cooper-Standard Automotive FHS, Inc., fka ITT Automotive, Inc., is a corporation duly organized under Delaware law with its principal place of business in the State of Michigan. This company manufactures parts for inclusion in automobiles. Respondent maintains facilities in the City of Archbold, Fulton County, Ohio where Petitioner was employed. Respondent is a subsidiary of ITT Industries, Inc. which is the parent company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 8, 2008. This decision was not recommended for full text publication by the Sixth Circuit. This Order is attached hereto as Appendix A. On December 22, 2008, Petitioner timely filed a Petition for Rehearing. In its order filed on February 5, 2009, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing. The Petition for Rehearing was submitted to the original panel. This order is unpublished and is attached as Appendix C. The Order of the Northern District of Ohio, Western Division (per Judge Jack Zouhary) granting Respondent's Motion for Summary Judgment in all respects was entered March 26, 2008 and is unpublished. See Appendix B. This Memorandum Opinion and Order was accompanied by a Judgment Entry also entered by the District Court on March 26, 2008. The Judgment Entry is also unpublished and is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The jurisdictional basis for federal jurisdiction in the Court of first instance was 28 U.S.C. Section 1332 because the parties are citizens of different states and the amount in controversy exceeds the sum of $75,000.00 exclusive of interests and costs. In her

original Complaint in the District Court, jurisdiction was invoked pursuant to 28 U.S.C. §1332. Plaintiff brought four claims under Ohio law: (discrimination based on disability in violation of Ohio Revised Code Sections 4112.01 et seq.; (2) unlawful retaliation in violation of the same statute; (3) intentional infliction of emotional distress; and (4) negligent hiring and retention of employees. Petitioner invoked the jurisdiction of the United States Court of Appeals for the Sixth Circuit pursuant to 29 U.S.C. Section 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The Statutes involved, Ohio Revised Code Sections 4112.01(a)(13), 4112.02(A), 4112.02(I) and 4112.99 are set forth in Appendix D.

STATEMENT OF THE CASE

Statement of Facts

Petitioner was employed as an hourly production employee with the Respondent commencing in October of 1966. The instant case pertained only to treatment of Petitioner by Respondent after January 10, 2003.

Petitioner testified that she had treated with Dr. Krueger as her family physician since 1994. Petitioner acknowledged that she was off on leave until February of 2003 when she was returned to work for 8 or 9 weeks until April of 2003 when the Respondent failed her out of her position in Miscellaneous Machine for failing to make production. Petitioner had been in the bending department when she was called back for

seven weeks. On March 31, 2003, she was then transferred to the "miscellaneous machine" department until she was failed out by Respondent and placed on layoff status on April 11, 2003. Clearly, she worked only two weeks in miscellaneous machine before her layoff. After the Respondent failed Petitioner out, it offered her a Furnace Feeder job, which Petitioner declined. Petitioner testified that people without a problem can't even handle that job and that it was a bent over position the whole time. She testified that it was the Respondent's idea that she try that job. Petitioner in August of 2003 was then put on a Cutting job that she thought she could do, but the company assigned her to another part of the job that she did not know was connected to the job and she failed herself out of it. When the Respondent failed Petitioner out of Miscellaneous Machine, Petitioner filed a grievance on April 11, 2003 which ultimately went to arbitration through the collective bargaining agreement process. The Arbitrator held against Petitioner because of her "inability and unwillingness to perform any job connected with the vital high speed lines as Miscellaneous Machine Operator that resulted in her disqualifications." Seven months after Petitioner was failed out by the Company as Miscellaneous Machine Operator, she was brought back to work in November of 2003 and she worked until April 21, 2004. On April 21, 2004, Ms. Breier was laid off and put on medical leave. Petitioner then filed grievance no. 35-04 to challenge the medical leave. Petitioner contended that she could have run No. 1 Pro Coat Die Cut but she was not given the opportunity. In April of 2004, Petitioner made a Request for Accommodation of Disability. Petitioner listed five specific jobs and a sixth opening. Ms. Breier stated that she could do Flaring and that there were

vacancies in that Department. There was a layoff and recall and Petitioner with her seniority should have been recalled into Flaring. Petitioner also referenced the Pro Coat Die Cut on her request for accommodation as well as any light and transitional duty position. Petitioner Breier was subsequently terminated on April 21, 2007 because the applicable collective bargaining agreement stated that medical leaves can only last three years. Petitioner testified that another employee with like restrictions, Wanda Spears, had been working with her restrictions for years. Brian Brown, Operations Manager, admitted that Plaintiff's seniority was in the top ten and he imagined that she had more seniority than Wanda Spears.

During the interim period when Petitioner was on medical leave for this three year period, she regularly filled out Job and Shift Preference Change forms every 90 days referring to the same jobs, Cutting, Flaring, Deburring and Miscellaneous Machine. Near the end of her employment, Petitioner filed for Social Security Disability. Her treating physician, Dr. Krueger, noted that Petitioner could not work because of tendonitis of the hips, a condition for which workers compensation was previously allowed her. Company documentation acknowledged that synovitis, neck, and tendonitis hips were allowed by workers compensation. Bernard Stone who was the Human Resources Manager for the Respondent's predecessor ITT Industries, Inc. testified that he was at the Archbold plant until the end of May 2003. Stone noted that Petitioner's doctor signed a note showing the date of injury as March of 1994 and that the doctor had marked a lifting restriction of 10 pounds and restrictions of standing and walking only one to two hours, avoid stooping, climbing, strain, twisting. The doctor had noted that Petitioner may

return to work with restrictions from February 19, 2003 and the doctor marked the restrictions as "Temporary." Stone admitted that employee Essie Shindler, who also had restrictions, was transferred to Flaring on February 24, 2003. As to restrictions, company officials stated that they made efforts to keep employees employed as opposed to being laid off if restrictions were for job related injuries. If the restrictions were not job related, the Respondent did not make accommodations for their restrictions. The Respondent contended that the Job and Shift Preference Change form was one that an employee could fill out to request a transfer into that classification or job when it becomes available. It is clear that Petitioner submitted such forms consistently for the positions of Miscellaneous Machine, Deburring, Flaring, and Cutting. Hourly skill level matrixes for Petitioner prepared by her supervisor showed that she could run the No. 6 and 7 Grieders in Cutting independently and the No. 4A and 4B Grieders in miscellaneous machine independently and the she could perform Flaring with more supervision or training. The company put only Petitioner on medical leave. The list showed Fred Dominique working with permanent restrictions. JoAnn Echler is shown as having permanent restrictions as was Wanda Spears. The Human Resource Manager at the Archbold Plant after February of 2005 testified that Wanda Spears was working in a work transition program while he "presumed" that Petitioner was not eligible for workers compensation because she was on medical leave. He testified that he had not reviewed her file. He also testified that Ms. Breier was not placed in restricted work because she was not workers comp. Restricted work is different than a light duty work position as restricted work involved e.g. on a plant floor, maybe

not the entire job. Light duty refers to makeshift work such as shredding, filing, answering phones. Julie Rosenbauer testified that she was the H.R. Administrator for Defendant and that she reviewed restrictions. She testified that Petitioner had worked mostly in the Bending Department for her career even though she had restrictions. Ms. Rosenbauer stated that persons on workers compensation had to be unrestricted to be returned and also that Petitioner has been considered Workers Comp. with a few medical conditions also kind of mitigating in there. When asked whether Petitioner was eligible for light duty or restricted duty, Rosenbauer was cryptic and unsure. Her answer was yes and no. She noted that Ms. Breier's restrictions always said temporary and recover but she appeared to draw the line because they said temporary for long periods of time. When questioned about Petitioner's workers compensation claim, Ms. Rosenbauer noted that the date of injury was 1994. The company record referenced Synovitis bilateral and Hips and Ms. Rosenbauer stated that she did not have the files and worked with restrictions and did not go back into what happened.

Scott Moser the Shop Committee Chairperson and Vice President of Plaintiff's Local Union (IAM Local Lodge 956), testified in his deposition that when Petitoner was failed out of her position in Miscellaneous Machine on April of 2003, her production standards on No. 7 Grieder were at or above the majority of the people who ran the machine at the time. Moser stated that although employees in Miscellaneous Machine rotated jobs at that time semi frequently, there were a few employees who seemed to be assigned to roughly the same machines. He specifically identified Shelley Urban, Jennifer Durbin

and Vickie Abbott as being generally on the die cut or the Haven or one of the 4A, 4-B Grieder and No. 7. Grieder. These machine assignments were made by the supervisor. Moser noted that if an employee were on layoff, they could stay on for as many years as they had seniority provided they sent a a registered letter once per year.

Jean Hallett, who was on the Local Union's Shop Committee, noted that when Petitioner was failed out of Miscellaneous Machine in April of 2003, the union obtained Accurate Cards that showed that Petitioner was doing as good or better than other employees on those machines. She noted that the company never had posted rates for efficiency for a long time. She stated that in Miscellaneous Machine, employees there did not have to work all positions. She noted that there were other people that were on restrictions that did not have to do the pulling of the tubing, which was in the back end where they ran the joiner and separated and expanded. She stated that without workers compensation in order to come back to work, an employee had to be 100% healed. Ms. Hallett cited the example of Pam Boetz who worked only back end jobs in Miscellaneous machines and John Dotson who could do the jobs but who did only one job in that department. Hallett testified that after Petitioner was put on medical leave in April of 2004, the company brought back persons into Flaring in the three year period afterward and has hired individuals during that time off the street into Miscellaneous Machine. Ms. Hallett testified that part or maybe all of Petitioner's restrictions were workers compensation because she was working with restrictions as far back as 1996 or 1997 and that her last day of work with the Defendant was April 21, 2004. Hallett testified that employees

Shelly Urban, Julie Haase, Vickie Abbott, and Wanda Spears had worked restricted or light duty for years. She also mentioned Jenny Lloyd but was unsure how long. Ms. Hallett also noted that the company's job descriptions were not very accurate. She stated that there were no written job descriptions when issues came up regarding Ms. Breier. Amy Abbott, in her deposition conducted on October 16, 2007, testified that she was a Miscellaneous Machine Operator for Respondent and that she had been employed with Respondent and its predecessor for almost 25 years. Abbott testified that in 2003 she went to Miscellaneous Machine. She stated that in that department most people rotate jobs, but there are some people who only work in the back and that there are some who work only up front and they never have to go to the back. The assignments were determined by the supervisor. Abbott served in various offices with the union and at the time of her deposition was a steward and on the shop committee. Abbott testified that Petitioner at the time of the deposition in October of 2007 still had one grievance pending. Abbott stated that Petitioner was on medical leave not really by her doctor but because she had restrictions and the Respondent would not let her work. Abbott testified that Petitioner's seniority terminated in April of 2007 and that if she had been on layoff as opposed to medical leave, she could have been laid of 39 years if she worked 39 years. Abbott testified that she helped Petitioner file her grievance form as there was another employee with restrictions, with less seniority working at the plant at the time who was not required to do every job in her department. That employee was Wanda Spears. Abbott knew that Spears did not have to go to the furnaces or any of the other jobs involved in auditing. As of May 15, 2006, Abbott stated that there were still

people working with restrictions and that restrictions were being accommodated by management so that persons who had restrictions might only have to perform one specific job. She stated that this has gone on for years and continues to go on. She stated that Vickie Abbott only has to run Havens because of her restrictions. She stated that JoAnn Echler has restrictions and does not have to work on the furnaces. Shelly Urban for quite a few years worked with restrictions and only ran Havens. She noted that Dave Dishong worked for a long period of time with restrictions and did not have to do a portion of his job and his accident was not work related at all. Abbott testified that Petitioner may have mentioned having reached maximum medical improvement for workers compensation in the 1990s but that she worked clear until 2004 under the same basic restrictions. She stated that there were jobs in the plant that Petitioner could still do, such as Grieders, the Havens, packing jobs. Abbott testified that with a little bit of accommodation, Petitioner could still do some of those jobs. She also mentioned the stripping department and Flaring and Deburring and said that she could be rotated enough between a few machines that she could do the job. She noted for example that whereas a job description for Flaring noted that based on what she had observed of the workers in her experience, Petitioner with her chair could sit 90 percent of the time and could work the job with modifications. She noted that the parts in Flaring were mostly short and that even if long, two or three of them would be no more than 5 pounds if they were 20-30 feet long. She further stated that there were positions available that Petitioner could work on during the three years that she was off on medical leave and added that right at the time of her deposition there were Miscellaneous

Machine openings in the last couple of months and other openings. As to Deburring and Stripping, she noted that she had seen people sit a lot. She noted that she had done the job of Stripper in the Cell and that you could sit a lot and when the Union tried to get Petitioner into that position, the Respondent insisted on rotation. She added that as of April of 2007, Petitioner was no. 13 in seniority. With respect to Petitioner's layoff in April of 2003, Abbott stated that the No. 7 Grieder was similar to the No. 4-A and 4-B Grieders. As to Grievance 62-04, Ms. Abbott stated that this grievance was dated August 11, 2004 and that the Respondent recalled or transferred people to Flaring and Petitioner had a slip for places she could be recalled and the Respondent did not allow her to come back and even try it.

Description of Proceedings Below

The District Court disposed of this case on the employer's Motion for Summary Judgment. The District Court found that Petitioner had filed a previous case in the District Court in which she had alleged unlawful discrimination and retaliation based on disability discrimination and retaliation. In the first case, Case No. 3:01CV 7432, the District Court had granted summary judgment to Defendant on January 10, 2003 which case was affirmed by the United States Court of Appeals for the Sixth Circuit on May 13, 2004. The within case raised allegations which had occurred subsequent to January 10, 2003, the date of disposal of Petitioner's claims by the District Court in the first action. The District Court concluded that Petitioner's claims in this action were barred by the doctrine of collateral estoppel since the issue was the same, the same issue was decided in the

prior case, and the issue was necessary to a decision on the merits. The District Court next held that even assuming that Petitioner's claim was not barred by the principle of collateral estoppel, she had not established that she was disabled under the statute because the limitations that she listed in her affidavit did not differ materially from those presented in the prior case and because the work restrictions were the same as those in the prior case. The District Court then reasoned that Petitioner could not safely and substantially perform the essential functions of her job as a machinist because of her receipt of Social Security disability benefits based on her representations of being totally disabled. The District Court found that Petitioner's explanation was insufficient to negate her sworn assertion in her social security application that she was unable to work. The District Court next turned to Petitioner's retaliation claim brought under Ohio discrimination law. The District Court found that temporal proximity between filing of an appeal in the previous case in the Sixth Circuit and being failed out of a position insufficient given compelling evidence of a legitimate reason for the adverse action. Alternatively, the District Court reasoned that the Petitioner had failed to demonstrate that the action taken by Respondent was pretextual. The District Court then found that the Petitioner had failed to bring forth any intentional or reckless actions designed to create emotional distress and that the claim was not supported by the record. Finally, the District Court dismissed Petitioner's claims for negligent hiring and retention of employees, finding that the necessary findings of incompetence and foreseeability were not established by Petitioner.

Ms. Breier then appealed to the United States Court of Appeals for the Sixth Circuit. There, acting pro se, she argued that she was disabled because of actions of her employer. She noted that every job which the Respondent offered her was very hard and she had to turn them down. She noted that she was never offered any job that she said that she could perform. Petitioner noted that because she had restrictions for tendonitis of the hips only, she should have been offered light duty, but while she was willing to do regular jobs, the Respondent would not let her do them. Petitioner also made reference to facts that referred to intentional infliction of emotional distress and retaliation. In its Order filed on December 8, 2008, the Sixth Circuit panel affirmed the District Court's decision. The Sixth Circuit disagreed with the District Court holding that Petitioner's claims were barred by principles of collateral estoppel. The Sixth Circuit held that Petitioner's claim arose from separate transactions from that giving rise to her prior 2001 claim, and is distinguishable from cases finding claim preclusion bars a subsequent claim. The Sixth Circuit, however, agreed with the alternative basis articulated by the District Court that Petitioner had failed to prove a prima facie case of discrimination. The Sixth Circuit, without any significant analysis, merely noted that the medical records which Petitioner had submitted in support of her claim do not establish that she is disabled. In addition, the Sixth Circuit noted that even if Petitioner could demonstrate that her condition had deteriorated since her prior litigation such that she was then disabled, the Respondent was still entitled to summary judgment because Petitioner could not show that she could safely and substantially perform the essential functions of the job because of her filing for and receiving social

security disability benefits based on a finding of total disability by the Social Security Administration. The Sixth Circuit agreed with the District Court that Petitioner's explanation was insufficient. The Sixth Circuit noted that Petitioner's explanation was a twofold one. Firstly, Petitioner had offered an affidavit claiming that she had filed her social security benefits claim because the Respondent had refused all of her efforts to obtain jobs. Secondly, the appellate court noted that Petitioner had suggested that the Social Security Administration's regulations resulted in an automatic finding because of her age.

The Sixth Circuit observed that Petitioner identified only the issue of the District Court's determination that she was not disabled and that her narrative to the Court in her pro se appellate brief also noted that the company hired an employee to cause her pain and suffering and suggested that the company was harassing her because of the first lawsuit. The Sixth Circuit noted that although the Court follows a general practice of construing liberally pro se petitioner's filings, Petitioner had abandoned claims of retaliation and intentional infliction of emotional distress by failing to develop an argument.

On December 22, 2008, Petitioner timely filed a pro se Petition for Rehearing. Petitioner contended that she was pro se, could not afford a lawyer, was under psychiatric care for ten years and asked for another chance.

In an order filed February 5, 2009, the Sixth Circuit panel, after review of the Petition for Rehearing concluded that it did not misapprehend or

overlook any point of law or fact when it issued its order. See Appendix C.

This case presents several questions. Firstly, there is the issue of whether the Sixth Circuit failed to consider Petitioner's evidence that she was disabled under Ohio's disability discrimination statute. In this regard, there is the further issue of whether the Sixth Circuit erroneously barred Petitioner's claim because she had subsequently filed a claim for social security benefits in which she claimed that she was totally disabled. Secondly, there is presented the issue of whether the Sixth Circuit failed to provide Petitioner, who was proceeding in her appeal on a pro se basis, a meaningful de novo review of the District Court's dismissal of her retaliation and emotional distress claims where she had mentioned the issue in her pro se brief before the Sixth Circuit and where the record contained earlier argument made on her behalf in the District Court by counsel which was available for review by the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

Disability Discrimination and Social Security Disability Issues

Petitioner, as noted, supra, contends she was in fact disabled under Ohio Revised Code Section 4112.01(a)(13). Moreover, she contends that she provided a sufficient explanation of the inconsistencies presented by her later filing of a social security disability application in which she attested that she was totally disabled.

Ohio law provides that it is unlawful for an employer to discriminate against an employee because of disability. Ohio Revised Code Section 4112.02(A). The Ohio statute defines disability as a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment. Ohio Revised Code Section 4112.01(a)(13). The definition of "disability" set forth in Ohio Revised Code Section 4112.01(a)(13) is substantially similar to the definition of disability set forth in the Americans with Disabilities Act. See 42 U.S.C. Section 12102(2). Ohio Courts find it appropriate to look to federal law for guidance in interpreting Ohio's law. Columbus Civil Serv. Comm'n v. McGlone, 82 Ohio St.3d 569, 697 N.E.2d 204 (1998).

The definition of disability under O.R.C. 4112.01(a)(13) includes an examination of the physical or mental impairment and includes an examination of its effects on major life activities. The major life activity of working, under Ohio law, is only one of the major life activities shown. The District Court simply noted that Petitioner did not establish that she was disabled because her restrictions were unchanged from the previous federal case which dealt with the time frame prior to January 10, 2003. Petitioner's medical records provided to the District Court show ongoing treatment, poor concentration, an Axis I diagnosis of Dysthymic Disorder with anxiety and in increase in medications after April of 2003 when a 100mg. prescription of Seroquel was added. They also show a

significant affect on major life activities of working, lifting, sitting, standing, bending, stooping, walking, sleeping, interacting with others, concentrating, and a whole range of everyday activities. Ohio Revised Code Section 4112.01(A)13 also provides that an individual can be disabled by virtue of a record of disability and by virtue of being regarded as disabled. In this case, Respondent was aware of Petitioner's long history of impairments and the resulting restrictions. It had kept her at work on a bending machine for a long time. After April of 2003 it suddenly failed her out of her category allegedly for not being able to rotate to other positions and ultimately put her out on medical leave and took the position that she was unable to perform any job in the plant over a three year period. Respondent also made specific findings that Petitioner was a safety risk for certain positions. It is submitted that Petitioner was disabled within the meaning of the Ohio statute.

The District Court and the Sixth Circuit also found that Petitioner was unable to demonstrate that she could safely and substantially perform the essential functions of her job. The Sixth Circuit cited Cleveland v. Policy Management. Systems Corp., 526 U.S. 795(1999), for the proposition that a plaintiff's sworn assertion in an application for disability benefits that she is unable to work will appear to negate an essential element of a disability discrimination claim at least if she does not offer a sufficient explanation for the inconsistency. The Sixth Circuit noted that Petitioner had only offered an affidavit stating that she filed her social security benefits claim because the company refused all of her efforts to obtain jobs and that she suggested that the Social Security Administration's regulations resulted in an automatic

finding of disability based on her age. The Sixth Circuit found this explanation insufficient, stating that Petitioner merely flatly contradicted her earlier claim that she had been totally disabled. In fact, the affidavit presented by Petitioner to the District Court noted that Petitioner had filed an application for Social Security Disability in late March of 2007, long after the instant lawsuit was commenced. She further attested that after three years of the Defendant refusing all of her efforts to obtain jobs that she thought she could perform with accommodation, she decided to file. She noted that the Defendant rejected all of her attempts to secure accommodation and adopted in effect a 100% healed return to work policy. In a supplemental affidavit, Petitioner attested that she was 62 years of age in early January of 2008. She provided the District Court Social Security Regulations and specifically Appendix 2 to Subpart P of Part 404–Medical–Vocational Guidelines. These guidelines show that for a finding of transferability of skills to light work for individuals of advanced age who are closely approaching retirement age (age 60-64), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry to avoid a finding of disabled under Social Security law. In Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999), this Court held that there is no special negative presumption in such case because the two claims do not inherently conflict. This Court pointed out that social security law does not involve an analysis whether an individual might be able to perform a job with reasonable accommodation. This court noted that claiming both Social Security benefits and ADA protection would therefore be consistent where an employee could do a job with an ADA reasonable

accommodation. This Court has observed in Cleveland that there are many situations in which an SSDI claim and an ADA claim can comfortably exist side by side. It is submitted that the evidence presented by Petitioner was exactly what was contemplated by this Court. Petitioner clearly established that she was able to work with accommodation, that accommodation was consistently denied her by Respondent, and that she then filed an SSDI claim after three years of efforts to get back to work. She then referenced SSDI regulations that call for disability findings for advanced age based on limited transferability of skills. It is submitted that the rejection of Petitioner's explanation by both Courts below were contrary to the holding of this Court in Cleveland, supra., and this Court's supervision is required to ensure proper and consistent application of the law.

Issue of Abandonment of Retaliation and Intentional Infliction of Emotional Distress Claims by Petitioner in Her Pro Se Appeal

Petitioner brought claims for retaliation under Ohio Revised Code Section 4112.02(I) and for Intentional Infliction of Emotional Distress under Ohio Common Law. The District Court rejected Petitioners claims. Respondent centered its entire argument in the retaliation issue on its contention that there was a lack of a causal nexus or link between the protected activity and the adverse actions against Plaintiff. In her Complaint, Petitioner alleged that the Sixth Circuit mediation was unsuccessful in the appeal of the earlier District Court decision issued on January 10, 2003. The Notice of Appeal was filed on January 27, 2003. A little over two months later, Plaintiff was failed out of miscellaneous machine. The mediation

office terminated its involvement on March 31, 2003 when settlement efforts failed and the appeal went forward. On April 11, 2003, Plaintiff was for the first time failed out. In his deposition, Bernard Stone testified that he was aware of settlement negotiations in the previous case shortly before Plaintiff was failed out. Stone also admitted that in January of 2003, he had attempted to contact Plaintiff's doctor to see if there were any more restrictions and he even indicated that he was willing to share with Dr. Krueger statements made by Ms. Breier under oath which seem to call for continuation of the restriction regarding the support of her arms on her knees. Dr. Krueger did not add any restrictions as suggested by Stone. In Singfield v. Akron Metro. Housing Auth., 389 F. 3d 555, 563 (6th Cir. 2004), the Sixth Circuit noted that temporal proximity of events–there three months–was significant enough to constitute sufficient evidence of a causal connection for the purpose of satisfying Singfield's burden of demonstrating a prima facie case. See also Haas v. Kelly Servs., Inc., 409 F. 3d 1030, 1037 (8th Cir. 2005); Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006). Even if timing plus is required, the inquiry of Stone made of Plaintiff's doctors in which he sought to add on to restrictions and the sudden requirement that Plaintiff perform more than one job in Miscellaneous Machine when other employees consistently worked on one job shows further evidence of a retaliatory motive. Despite this argument presented by Petitioner in the District Court, when she proceeded before the Sixth Circuit on a pro se basis, she presented a passing mention of retaliation and of company hiring of another employee to cause her pain and suffering which the Sixth Circuit noted could be construed as raising issues of intentional infliction of emotional distress and retaliation. The Sixth Circuit

held, however, that because Petitioner had made only passing reference to these issues, she abandoned those claims. In fact, the Sixth Circuit reviews a District Court order granting summary judgment de novo. Terry Barr Sales Agency, Inc. v. All-Lock Co., 96 F.3d 174 (6th Cir. 1996). In this case, Petitioner, while pro se, should have been given the benefit of liberal construction of her pleadings and filings. The Sixth Circuit could have reviewed Petitioner's pro se arguments and reviewed in together with argument made by her counsel before the District Court. It is submitted that the Sixth Circuit should have reviewed Petitioner's brief in conjunction with the argument presented to the District Court to allow for a meaningful de novo review of the summary judgment entered by the District Court. In Haines v. Kerner, et al., 404 U.S. 519, 92 S. Ct. 594 (1972), this Court held that a damages complaint filed pro se should not have been dismissed without affording the pro se Plaintiff an opportunity to present evidence on his claims. Petitioner here should have been given benefit of a meaningful de novo review on the potential claims of retaliation and intentional infliction of emotional distress.

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Breier respectfully requests that a writ issue as prayed for in order to review the aforedescribed Sixth Circuit Opinion set forth in Appendix.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-3619

[Filed December 8, 2008]

SHARON S. BREIER,)
)
Plaintiff-Appellant,)
)
v.)
)
COOPER-STANDARD AUTOMOTIVE)
FHS, INC., fka ITT Automotive, Inc.,)
)
Defendant-Appellee.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

O R D E R

Before: CLAY and GIBBONS, Circuit Judges; STAMP, District Judge.*

The plaintiff, Sharon S. Breier, originally filed suit in state court against her employer, ITT Automotive, Inc., alleging disability discrimination in violation of Ohio Revised Code § 4112.02(A); retaliation in violation of Ohio Revised Code § 4112.01 et seq.; intentional or reckless infliction of emotional distress; and negligent hiring and retention of employees. The case was removed to federal court on the basis of diversity and ultimately resulted in an order granting summary judgment to the defendant on all claims. Breier now appeals, arguing only that the district court incorrectly determined that she did not suffer from a disability. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Breier had been employed at the ITT plant since October 7, 1966. The majority of Breier's work was in ITT's "bending department," where she operated a machine that shapes "or bends" piping to customer specifications. Since 1994, Breier has worked with medical restrictions while under the care of her treating physician, Dr. Krueger. When this action was filed, she suffered from various medical complaints, including fibromyalgia, tendinitis of the hips,

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* The Honorable Frederick P. Stamp, Jr., United States District Judge for the Northern District of West Virginia, sitting by designation.

dysthymic disorder with anxiety and poor concentration.

Breier has filed several union grievances, allegedly arising from failures during her employment, to accommodate her limitations. In 2002, she filed a grievance after ITT laid her off in June of that year. ITT recalled Breier to work in February 2003 while arbitration of that grievance was pending. In March 2003, ITT, in the process of permanently discontinuing its bending department, transferred Breier to the miscellaneous machine department. After a five-week evaluation period, ITT determined Breier was not meeting production standards and "failed" her out of the position, effectively laying her off in April 2003. She filed another grievance and, in the interim, declined two separate positions in July and August because she did not believe she could safely perform the functions. The arbitrator held in favor of ITT, finding that the ability to work the various high-speed lines in the machine department was essential to the job and that Breier could not perform these functions.

Breier was given a second opportunity in the miscellaneous machine department in November 2003, but she could only operate two machines, both of which were later removed to another plant. Breier was placed on medical leave in April 2004. ITT "terminated" her employment in April 2007, relying on a provision in the collective bargaining agreement which states that medical leave cannot exceed three years.

Breier filed the instant action in state court alleging discrimination based on disability in violation of Ohio Rev. Code § 4112.01 et seq., unlawful retaliation in violation of the same statute, intentional

or reckless infliction of emotional distress, and negligent hiring and retention of employees. As previously noted, the case was removed to federal court. In granting the defendant's motion for summary judgment, the district court determined that: 1) the disability discrimination claim is barred by the principle of collateral estoppel because this claim was previously litigated in an earlier disability discrimination case Breier filed in 2001; 2) even assuming the disability discrimination claim is not barred by collateral estoppel, Breier has failed to establish a prima facie case of disability discrimination; 3) Breier has failed to establish a prima facie case of retaliation; 4) even assuming that Breier can establish a prima facie case of retaliation, the defendant has offered a legitimate non-discriminatory reason for Breier's April 2003 layoff and Breier has failed to produce sufficient evidence that the reasons were merely a pretext designed to mask retaliation; 5) Breier's intentional or reckless infliction of emotional distress claim is unsupported; and 6) Breier's claim that ITT breached its duty of care by hiring and retaining employees who engaged in or tolerated discrimination against Breier could not survive summary judgment because Breier has no evidence to suggest that ITT was aware of some pattern of conduct by various supervisors that should have given rise to concerns.

We review an order granting summary judgment de novo. *See Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

Upon review, we conclude that the district court properly granted summary judgment to the defendant because Breier failed to establish a prima facie case of disability discrimination. However, we disagree with the district court that collateral estoppel bars Breier's current claim that the defendant's employment decisions constituted disability discrimination under Ohio law.

This Court reviews *de novo* a district court's application of collateral estoppel. *United States v. Sandoz Pharms. Corp.*, 894 F.2d 825, 826 (6th Cir. 1990). In determining the preclusive effects of a decision issued by a federal court, this Court "look[s] to federal law." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007).** Collateral estoppel, or issue preclusion, generally applies when the plaintiff's second suit is based on a different cause of action, "and the judgment in the prior suit precludes relitigation of issues actually litigated in, and necessary to the outcome of, the first case." *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 161 n.2 (6th Cir. 1996). In contrast, the doctrine of claim preclusion applies to "extinguish[] all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose." *Hamilton's Bogarts, Inc.*, 510 F.3d at 650 (internal quotation marks omitted). Thus, whether the

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** Thus, to the extent the district court relied on state preclusion law to reach its conclusion, its reliance was misplaced.

district court's 2003 grant of summary judgment to the defendant precludes her present claim is more appropriately analyzed under the doctrine of claim preclusion.

Neither preclusion doctrine, however, applies to Breier's claim. Although the 2003 decision granting summary judgment to the defendant determined that Breier was not disabled, that determination was made on the basis of facts occurring prior to January 10, 2003, the date of the district court's decision. The district court in the present case, although noting that Breier's complaint relied on "events that occurred subsequent to January 10, 2003," determined that the facts Breier presented in the present case were "not materially different from the facts in the first action."

Breier's complaint, however, claims that "subsequent to January 10, 2003, she was a disabled/handicapped person within the meaning of Ohio Revised Code [§] 4112.01(a)(13) and/or that she was perceived of or regarded as having a disabling condition by Defendants and/or that Defendants acted against her because of her record of impairment." Breier's complaint further alleged that "Defendant[s] took a most restrictive position that she was not able to work any other position in the plant [and] . . . that the Defendants fostered a scheme to keep Plaintiff from working anywhere in the plant." As evidence of the discriminatory conduct, Breier notes that, in April 2003, she was found unqualified to perform the miscellaneous machine classification and "failed out" and that Defendant put her on medical leave in April 2004 even though she claimed she could perform certain jobs. Thus, Breier's present lawsuit alleges that her employer discriminated against her on the basis of

her disability by concluding that she was unable to perform work at the plant in April 2003 and 2004, when in fact she was able to do so with accommodations.

In contrast, her prior suit alleging disability discrimination claimed that the employer's decision to "put her on layoff" in July of 2000 constituted discrimination on the basis of her disability. Accordingly, Breier's current claim arises out of a separate transaction from that giving rise to her 2001 claim, and is distinguishable from cases finding claim preclusion bars a subsequent claim. *E.g.*, *Hapgood v. City of Warren*, 127 F.3d 490, 494 (6th Cir. 1997) (concluding that where a plaintiff previously claimed that the employer unlawfully discharged him in retaliation for filing a workers compensation claim related to his back pain, claim preclusion barred the plaintiff's subsequent claim that the employer violated the ADA by failing to provide a reasonable accommodation for his back pain because both actions "center[ed] around plaintiff's back problems and his subsequent conflicts with [his employer]"). Accordingly, we conclude that the 2003 grant of summary judgment to the defendant does not preclude Breier's claims in the present action.

As an alternative basis for its conclusion that the defendant was entitled to summary judgment, the district court concluded that Breier failed to prove a prima facie claim of disability discrimination. We agree. In order to make out a prima facie case of disability discrimination under Ohio law, a plaintiff "seeking relief must demonstrate (1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, because the

individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question." *City of Columbus Civil Serv. Comm'n v. McGlone*, 697 N.E.2d 204, 206 (Ohio 1998). The district court found that Breier could not show that she was "disabled." Under Ohio law, an individual is disabled if he or she has a condition that constitutes a "substantial limitation on a major life activity," meaning "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's lives." *Toyota Motor Mfg., Ky. Inc., v. Williams*, 534 U.S. 184, 197 (2002). The medical records that Plaintiff submitted in support of her claim do not establish that she is disabled.

Even if Breier could demonstrate that her condition had deteriorated since the prior litigation such that she has become disabled, the defendant remains entitled to summary judgment because Breier cannot show that she can "safely and substantially perform the essential functions of the job in question." As the district court noted, although Breier claimed that she could work as a machinist, Breier also filed for, and received, social security benefits after the Social Security Administration found that she was totally disabled.

The Supreme Court has recognized that "a plaintiff's sworn assertion in an application for disability benefits that she is . . . 'unable to work' will appear to negate an essential element of [a disability discrimination claim]—at least if she does not offer a sufficient explanation [for the inconsistency]." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). This Court has also found that, "in order to

survive a motion for summary judgment, the plaintiff's 'explanation must be sufficient to warrant a reasonable juror's concluding that . . . the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation.'" *Williams v. London Util. Comm'n*, 375 F.3d 424, 429 (6th Cir. 2004) (internal quotation marks omitted) (omission in original) (quoting *Cleveland v. Policy Mgmt.*, 526 U.S. at 807). Thus, Breier cannot "simply ignore the apparent contradiction" but "must proffer a sufficient explanation." *Cleveland v. Policy Mgmt.*, 526 U.S. at 806.

Breier, however, fails to provide such an explanation. As the district court noted, she offers only an affidavit stating that she filed her social security benefits claim because "the Defendant refused all of [her] efforts to obtain jobs." She also suggests that the Social Security Administration's regulations resulted in an automatic finding of disability based on her age. Breier, however, does little more than "flatly contradict" her earlier claim that she was totally disabled. *See id.* Accordingly, because Breier has failed to provide a sufficient explanation for why she remains able to perform the essential functions of the machinist job despite her claim that she was totally disabled, Breier cannot show that she can "safely and substantially perform the essential functions of the job in question," and therefore has failed to make out a prima facie claim of disability discrimination.

Thus, we affirm the district court's grant of summary judgment with respect to Breier's disability discrimination claim.

Finally, although Breier identifies solely the issue of the district court's determination that she was not disabled as the issue for appeal, her narrative to the court in her appellate brief also notes that the company "hired an employee to cause [her] pain and suffering" and suggests that the company is "harassing" her as a result of the first lawsuit. Such statements could be construed as raising the issues of intentional infliction of emotional distress and retaliation. Breier is proceeding se, and this Court follows "the general practice of liberally construing pro se petitioner's flings." *Spencer v. Bouchard*, 449 F.3d 721, 726 (6th Cir. 2006) (citing *McNeil v. United States*, 508 U.S. 106, 113 (1993)). Although pro se filings are construed liberally, failure to develop an argument on appeal constitutes waiver of that argument. *United States v. Bolds*, 511 F.3d 568, 581 n.8 (6th Cir. 2007); *see McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997). Thus, although Breier's filings in this court could be construed to raise the issue of retaliation and intentional infliction of emotional distress, Breier makes only passing references to these issues and, as a result, has abandoned these claims.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:06 CV 2862

[Filed March 26, 2008]

Sharon S. Breier,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
Cooper-Standard Automotive FHS, Inc.,	)
	)
Defendant.	)
	)

JUDGE JACK ZOUHARY

MEMORANDUM OPINION AND ORDER

JURISDICTION

The Court has subject matter jurisdiction under 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds $75,000. Plaintiff Sharon Breier is a citizen and resident of the State of Ohio, and Cooper-Standard

Automotive, Inc. (CSA) is a Delaware corporation with its principal place of business in Michigan.

BACKGROUND

Plaintiff worked for Defendant CSA and its predecessor in interest, ITT Automotive Industries, Inc. (interchangeably referred to as Defendant), at its Archbold, Ohio plant since 1966. The majority of Plaintiff's work was in the bending department, operating a machine that shapes "or bends" piping to customer specifications. Plaintiff is a member of Local Lodge 956 of the International Association of Machinists and Aerospace Workers (Union), and her employment relationship is governed by collective bargaining agreements.

In a previous case in this Court before Judge David Katz (Case No. 3:01 CV 7432), Plaintiff claimed unlawful discrimination and retaliation based on an alleged disability in violation of Ohio Revised Code § 4112.01 et seq. On January 10, 2003, the Court granted summary judgment dismissing Plaintiff's claims of discrimination and retaliation (Doc. No. 29-12). The Sixth Circuit affirmed the decision (Doc. No. 29-13) on May 14, 2004.

In this new Complaint, Plaintiff alleges four counts: (1) discrimination based on disability in violation of Ohio Revised Code § 4112.01 et seq.; (2) unlawful retaliation in violation of the same statute; (3) intentional or reckless infliction of emotional distress; and (4) negligent hiring and retention of employees. These claims are based on events occurring after January 2003 when Judge Katz dismissed Plaintiff's

earlier case. Defendant, as before, moves for Summary Judgment.

FACTS

Plaintiff suffers from physical and mental impairments, including fibromyalgia, tendinitis of the hips, dysthymic disorder with anxiety and poor concentration. Since 1994, Plaintiff has worked with medical restrictions while under the care of her treating physician, Dr. Krueger. Plaintiff has filed several union grievances during her employment allegedly arising from failures to accommodate her limitations. In 2002, she filed a grievance after Defendant laid her off in June of that year. Defendant recalled Plaintiff to work in February 2003 while arbitration of that grievance was pending. In March 2003, Defendant, in the process of permanently discontinuing its bending department, transferred Plaintiff to the miscellaneous machine department. After a five-week evaluation period, Defendant determined Plaintiff was not meeting production standards and "failed" her out of the position, effectively laying her off in April 2003. She filed another grievance and, in the interim, declined two separate positions in July and August because she did not believe she could safely perform the functions. The arbitrator held in favor of Defendant, finding the ability to work the various high-speed lines in the machine department was essential to the job and that Plaintiff could not perform these functions.

Plaintiff was given a second opportunity in the miscellaneous machine department in November 2003 but she could only operate two machines, both later removed to another plant. Plaintiff was placed on

medical leave in April 2004. Defendant "terminated" her employment in April 2007, relying on a provision in the collective bargaining agreement which states that medical leave cannot exceed three years (Def. Ex. 10, ¶15.0(b)). (Plaintiff filed a grievance to challenge this decision, but its status is not part of the Record.) This lawsuit followed.

DISCUSSION

Summary Judgment Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Civil Rule 56(c). The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the non-movant's claim. *Id.* at 323-25. Once the movant meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (*quoting* Federal Civil Rule 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its

pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324; *see also Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Ultimately, this Court must determine "whether [the evidence] is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Atchley v. RK Co.*, 224 F.3d 537, 539 (6th Cir. 2000).

1. Disability Discrimination

Ohio Revised Code § 4112.02(A) makes it unlawful "[f]or any employer, because of the . . . disability . . . of any person, to discharge without just cause . . . or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment." A "disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities, including . . . caring for one's self, manual tasks, walking . . . and working." Ohio Revised Code § 4122.01(13).

To establish a claim of disability discrimination, Plaintiff must establish:

> (1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question.

Columbus Civil Serv. Comm. v. McGlone, 82 Ohio St. 3d 569, 571 (1998) (citing *Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St. 3d 279, 281 (1986)).

Collateral Estoppel

Defendant argues the disability discrimination claim is barred by the principle of collateral estoppel because Judge Katz previously decided this issue.

Under Ohio law, to successfully preclude a party from litigating an issue, one must establish the traditional elements of collateral estoppel, namely: whether the issue in the subsequent litigation (1) is identical to that resolved in the prior action; (2) was actually litigated and decided in the prior action; and (3) was necessary and essential to a judgment on the merits in the prior action. In addition, the Court must find the party to be estopped was a party (or in privity) to the prior action and had a "full and fair opportunity to litigate the issue." *Brewster v. Barnhart*, 145 F. App'x 542, 547 (6th Cir. 2005) (citing *Hamer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999)). All three tests are met in the instant case and the parties are the same.

Plaintiff argues this is a different case. To be sure, collateral estoppel does not apply where "there has been a change in the facts in a given action which

either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action." *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St. 2d 42, 45 (1980). However, the "new" facts Plaintiff presents are not materially different from the facts in the first action.

The continued and consistent work restrictions issued by Dr. Krueger have not changed since January 2003. Dr. Krueger lists identical work restrictions on each medical form. Plaintiff points the Court to her treatment records and a narrative prepared by Dr. Krueger regarding her limitations (Doc. 30, Ex. A-C). The Court thoroughly examined these records in search of any new limitations, but found none. While these records reflect an increase in dosage for some medications, they reflect no worsening of her condition that led to additional limitations on her daily activities. The records before and after January 2003 are virtually identical and show no change in the material facts.

Plaintiff also provides her own affidavit testifying to limitations on her daily activities other than work. Even accepting these assertions (which are not supported by specific observations in the medical records), Plaintiff has not presented evidence materially different from what was before Judge Katz in the prior case. Indeed, Judge Katz observed that Plaintiff's limited ability to perform household chores, go shopping, babysit and concentrate did not rise to the level of disability under the Ohio Revised Code (Doc. No. 29-12, at pp. 5-6). The facts Plaintiff now presents are essentially the same.

The three factors in *Brewster* cited above have been met here. The (1) issue is the same; (2) was decided in the prior case; (3) and was necessary to a decision on the merits. Plaintiff is precluded from raising the discrimination claim again.

Disabled under Ohio Revised Code § 4112.01

Even assuming Plaintiff's claim is not barred by collateral estoppel, she has not established she is disabled under the statute.

An individual is "disabled" under the disability discrimination statute in Ohio if his or her condition constitutes a "substantial limitation on a major life activity," meaning "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's lives." *Toyota Mfg. v. Williams*, 534 US 184, 197 (2002); *see also McGlone*, 82 Ohio St. 3d at 573. ("We can look to regulations and cases interpreting the federal Act [Americans with Disabilities] for guidance in our interpretation of Ohio law.") Plaintiff's impairment has continued since the prior case. However, the limitations she lists in her affidavit do not differ materially from those presented in the prior case. Moreover, Dr. Krueger lists the same work restrictions for her throughout this period which indicates the limitation on Plaintiff's ability to work has not materially changed. Accordingly, Plaintiff has not demonstrated she is disabled under the statute.

Safely Perform the Essential Functions of the Job

Plaintiff claims she can safely perform the essential functions of the machinist job, yet filed an application for Social Security disability and was approved for total disability.

Defendant argues Plaintiff cannot safely perform the essential functions of the machinist job in part because of her receipt of Social Security benefits based on her own representation of being "totally disabled." Logically, a total disability finding is inconsistent with an ability to safely perform the job. The Supreme Court has held: "[A] plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA [Americans with Disabilities Act] case-at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI [Social Security Disability Insurance] total disability claim. Rather, she must proffer a sufficient explanation." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). This holding requires a plaintiff to explain away the discrepancy inherent in a finding of total disability. Merely filing an "affidavit that flatly contradicts that party's earlier sworn deposition" is insufficient. *Id.*

Here, Plaintiff offers (1) her affidavit (Doc. No. 30-6) which states: "I filed this Social Security application certifying I was totally disabled because for a period of three years the Defendant refused all of my efforts to obtain jobs that I thought I could perform with

accommodation. My seniority was about to run out and I had no further recourse . . . ."; and (2) a copy of the Social Security regulations indicating for someone over age 55, as Plaintiff is, the standard for finding an applicant disabled does not mean the applicant is unable to perform **any** job. Plaintiff does not point to a specific section of the regulations, but the Court finds §§ 201-203 of the regulations provide that limited education and age over 55 can lead to a Social Security disability even where the applicant still has some transferrable skills and residual functioning capacity. *See* 20 C.F.R. pt. 404, subpt. P, app.2, §§ 200-204.

Yet nothing in the Record explains away her Social Security disability or how she is still able to perform the essential functions of her job. Her affidavit is insufficient because Plaintiff offers no support that she can perform temporary light-duty jobs. Indeed, the thrust of her explanation is she needed to file for disability because she was not medically cleared to return to work. Whether she applied for Social Security out of financial necessity is not competent evidence to contradict her claimed disability. *See Justice v. Pike Co. Bd. of Ed.*, 348 F.3d 554, 564 (6th Cir. 2003).

This case is distinct from *Kiely v. Heartland Rehab. Svcs.*, 359 F.3d 386, 389-91 (6th Cir. 2004), where the court found the employee was able to perform the functions of the job despite filing for Social Security. Social Security filings are "open to interpretation," and plaintiff, who was blind, was automatically covered under Social Security. The employee there did not indicate he had "an actual inability to work," but rather offered a concrete explanation for the Social Security disability discrepancy. This is a far cry from

the instant case where Plaintiff suggests, at most, that perhaps Social Security deemed her able to work because the regulations treat those over age 55 differently from younger applicants. Such speculation is insufficient to rebut Plaintiff's sworn application representing she was unable to work. To find otherwise would allow parties to simply contradict their earlier sworn statement of total disability without a specific explanation for the inconsistency.

Therefore, on several fronts, Plaintiff has failed to establish a *prima facie* case of disability discrimination.

2. Retaliation

Plaintiff also claims Defendant unlawfully retaliated against her in violation of Ohio Revised Code § 4112.02(I). ("It shall be an unlawful discriminatory practice . . . . [f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.") Ohio courts have set forth the three elements comprising the *prima facie* case: (1) plaintiff engaged in a protected activity; (2) plaintiff was subjected to adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Eckstrom v. Cuyahoga Cty. Comm. Coll.*, 150 Ohio App. 3d 169, 180 (2002).

Judge David Katz granted Defendant summary judgment on this claim as well in the prior case. However, collateral estoppel does not apply because this claim is now based on a new fact. Plaintiff claims her appeal from Judge Katz's decision to the Sixth Circuit on January 27, 2003 resulted in retaliatory action on April 11, 2003 when Plaintiff was "failed" out of a position for the first time. Assuming filing the notice of appeal is a "protected activity"[1] and that being "failed" out of the position was "adverse," Plaintiff still must show causation. In the Sixth Circuit, temporal proximity of fewer than sixth months can support a *prima facie* case with nothing more. *See Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004) However, if Defendant offers "compelling evidence" of a legitimate reason for the adverse action, temporal proximity alone is insufficient to meet Plaintiff's burden. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Steiner v. Henderson*, 121 F. App'x 622, 626-27 (6th Cir. 2005). Defendant explains it laid Plaintiff off in April 2003 because she could not perform most functions on the machine line. This logical explanation is supported by the Record and by the decision of the arbitrator in 2006

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[1] It is not clear that appealing an adverse decision as part of litigation that has been ongoing for several years is a "protected activity" sufficient to trigger a new analysis of causation and temporal proximity. Such a holding could effectively allow parties to circumvent the causation requirement by claiming any action during litigation is a new "protected activity." For instance, in this case, it is not readily apparent that appealing a decision that favored Defendant would trigger a motivation to retaliate. However, because the issue is not dispositive and the Court finds no controlling authority on the question, it will assume, without agreeing, that filing the notice of appeal may satisfy the first element of the claim.

(Def. Ex. 12). Defendant also offered Plaintiff other less demanding positions that Plaintiff herself refused because she felt she could not perform them. Therefore, the temporal proximity in this case, standing alone, cannot support a *prima facie* case.

Even if the temporal proximity were sufficient, Plaintiff then bears the burden of showing that the purportedly legitimate, non-discriminatory reason was merely a pretext for discrimination. *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Because Defendant offered the legitimate, non-discriminatory business reason discussed above, the burden shifts to Plaintiff to offer evidence that this reason is merely a pretext. *Singfield*, 389 F.3d at 563. She may do so by showing the offered reason: (1) had no basis in fact; (2) did not actually motivate the decision to terminate; or (3) was insufficient to warrant the decision to terminate. "A plaintiff must do more than simply impugn the legitimacy of the asserted justification for her termination; in addition, the plaintiff 'must produce sufficient evidence from which the jury may reasonably reject the employer's explanation.'" *Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 730 (6th Cir. 1999) (citing *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (1994)).

Plaintiff here does not claim that Defendant's stated reason has no basis in fact. Rather, she seems to suggest the reason did not "actually motivate the decision," but then offers no evidence, direct or circumstantial, showing the lay off was likely motivated by discrimination. Plaintiff's supposition that a supervisor, Mr. Stone, was aware of the Sixth Circuit appeal when he contacted Plaintiff's doctor to determine her restrictions in no way meets this

burden. Plaintiff assumes, without explaining why, that a supervisor's verification of work restrictions is in some way inappropriate or a pretext for unlawful retaliation. The Court fails to see such logic.

Finally, Plaintiff has not shown the offered reason was "insufficient to warrant the decision to terminate." She could satisfy the burden by pointing to other employees who engaged in similar conduct but were not laid off. "The compared employees must have 'nearly identical' situations and be similar in all relevant aspects." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994). Plaintiff does not point to any others who were unable to perform the majority of tasks and yet were not laid off. Plaintiff's unsupported statement that certain other employees were allowed to continue working with permanent restrictions, but without identifying the precise job descriptions or nature of these restrictions or disabilities, does not rise to the required level of similarity.

Because Defendant has offered a legitimate non-discriminatory reason for the April 2003 lay off and Plaintiff has failed to produce sufficient evidence the reason is merely a pretext, the retaliation claim is also dismissed.

3. Intentional or Reckless Infliction of Emotional Distress

Plaintiff alleges Defendant intentionally inflicted emotional distress by "orchestrating a series of incidents which led to continued harassment" (Compl. ¶ 22). She claims her April 2003 lay off and the alleged

refusal to offer reasonable accommodations caused her emotional distress.

To prove this claim, Plaintiff must establish: (1) "that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *Phung v. Waste Mgmt., Inc.*, 71 Ohio St. 3d 408, 410 (1994).

Plaintiff devotes one paragraph in her briefing to this claim (Opp. at p. 15), admitting she has "no evidence to support the claim for emotional distress" and no evidence of a "calculated and intentional plan" (Breier Dep. at p. 100-02). Furthermore, the Record discloses no intentional or reckless actions designed to create emotional distress. Plaintiff's statement that "the long pattern of keeping [her] out of work rises to the threshold of this tort" (Opp. at p. 15) is insufficient to meet her burden to avoid summary judgment. The claim is simply not supported.

4. **Negligent Hiring**

Finally, Plaintiff alleges Defendant breached its duty of care by hiring and retaining employees who engaged in or tolerated discrimination against Plaintiff.

To establish liability, Plaintiff must show:

> (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or

> omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Evans v. Ohio State Univ., 112 Ohio App. 3d 724, 739 (Ohio App. 1996) (internal quotation marks omitted).

Ohio courts have construed this cause of action narrowly and, as Defendant points out, the necessary finding of "incompetence" is simply not satisfied by Plaintiff's allegations that supervisors put her out of work in violation of the law. Even assuming Defendant's employees acted wrongly, Ohio courts require foreseeability in order to find an employer liable for improper conduct by its employees. Plaintiff has not produced evidence that Defendant was aware of some pattern of conduct by various supervisors that should have given rise to concerns. *See Browning v. Ohio State Highway Patrol*, 151 Ohio App. 3d 798, 810 (2003) (holding foreseeability is a necessary element in this cause of action). Because Plaintiff fails to point to specific evidence supporting this claim, for this reason too, the claim is dismissed.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (Doc. No. 28) is granted.

IT IS SO ORDERED.

s/ Jack Zouhary
JACK ZOUHARY
U. S. DISTRICT JUDGE
March 26, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:06cv2862

[Filed March 26, 2008]

Sharon S. Breier,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
Cooper-Standard Automotive FHS, Inc.,	)
	)
Defendant.	)
	)

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously with this entry IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

s/ JACK ZOUHARY 3/26/08
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-3619

[Filed February 5, 2009]

SHARON S. BREIER,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
COOPER-STANDARD AUTOMOTIVE FHS, INC., fka ITT Automotive, Inc.,	)
	)
Defendant-Appellee.	)

ORDER

Before: CLAY and GIBBONS, Circuit Judges; STAMP, District Judge.*

* The Honorable Frederick P. Stamp, Jr., United States District Judge for the Northern District of West Virginia, sitting by designation.

The plaintiff-appellant has filed a motion for rehearing of this court's order of December 8, 2008, affirming the district court order granting summary judgment to the defendants in this civil action alleging disability discrimination in violation of Ohio Rev. Code § 4112.02(A); retaliation in violation of Ohio Rev. Code § 4112.01 et seq.; intentional or reckless infliction of emotional distress; and negligent hiring and retention of employees.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a).

The motion for rehearing is thus denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX D

STATUTES

OHIO REVISED CODE 4112.01
TITLE [41] XLI LABOR AND INDUSTRY
CHAPTER 4112: CIVIL RIGHTS COMMISSION

(A) As used in this chapter:

* * *

(13) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

Effective Date: 03-17-2000; 07-01-2007; 2007 HB372 03-24-2008; 2008 SB289 08-22-2008

OHIO REVISED CODE 4112.02
TITLE [41] XLI LABOR AND INDUSTRY
CHAPTER 4112: CIVIL RIGHTS COMMISSION

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, military status, national origin,

disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

* * *

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

Effective Date: 07-06-2001; 2007 HB372 03-24-2008

OHIO REVISED CODE 4112.99
TITLE [41] XLI LABOR AND INDUSTRY
CHAPTER 4112: CIVIL RIGHTS COMMISSION

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

Effective Date: 07-06-2001